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# In the Supreme Court of the United States

OCTOBER TERM, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

ALPINE RIDGE GROUP, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

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## QUESTION PRESENTED

Whether Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, violates the Due Process Clause of the Fifth Amendment by abrogating vested contract rights.

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties to the proceedings in the courts below: the United States Department of Housing and Urban Development; the United States; Monroe Associates, a limited partnership; Brentwood, a limited partnership; Campbell Courts Associates, a partnership; Cheney Gardens Limited Partnership, a limited partnership; Bitterroot Manor, a limited partnership; Acacia Villa; Alicia Park Apartments; Amerige Villa; Antelope Valley; Crown Plaza Associates, a Limited Partnership; Crestwood Inn, Inc.; Dakota Meadows Associated, a Limited Partnership; Douglas Grove, a Limited Partnership; Golden Valley Homes Associates, a Partnership; Gary D. Erickson; Bothell Landing Associates, a Partnership; Howard O. Wilson and Donita E. Wilson; Moses Lake Estates, a Limited Partnership; Howard Street Association, a Limited Partnership; Magnuson Group, a Joint Venture; Marion Court Associates, a Partnership; Meadowood Development Co., LTD.; Rainier Vista Associates, a Limited Partnership; Rawlins & Rex, a Partnership; Gordon Henrickson; Olympic Village, LTD., a Limited Partnership; Robert & Ingrid Becker, husband and wife; Park West Associates, a Limited Partnership; Sound View Associates, a Partnership; South Bayview Associates, a Partnership; Sundowner Associates, a Limited Partnership; Wapato Gardens, a Limited Partnership; Westwood Associated, a Partnership; Willapa Landing Associates, a Limited Partnership; Axelrod Marymoor Associates, a Limited Partnership; Security Rental Properties, a Partnership; Park West Associates, a Limited Partnership; Riverwood Manor Associates, a Partnership; Wright Park Associates, a Limited Partnership; Yakima Gardens, a Limited Partnership; Michael and Patti Carpinito, husband and wife; Dan and Carol Carpinito, husband and wife; Vista Lee Rosa Co., a Partnership; Terra Bella Development Co., a Partnership;



Goldsborough Creek Associates, a Limited Partnership; Craigmont Associates, a Limited Partnership; Fernhill Terrace Associates, a General Partnership; Meriwether Village, a General Partnership; COHO Park, a General Partnership; Lacey Housing, Inc., a General Partnership; Marvin L. Koh, Audrey S. Koh, Barbara E. Koh, Christopher C. Koh and David A. Koh; Narrows Apartments Associates; Hotel Oakland Associates, a Limited Partnership; Emeric Goodman Associates, a Limited Partnership; Azusa Park Apartments, a California Limited Partnership; Capitola Gardens, a California Limited Partnership; Carondelet Apartments, a California Limited Partnership; Charter Oaks, a California Limited Partnership; Civic Plaza, a California Limited Partnership; Citrus Arms, a California General Partnership; Clayton Gardens, a California Limited Partnership; Columbus Terrace, a California General Partnership; Commerce Senior Citizens, a California Limited Partnership; Covina Manor, a California Limited Partnership; Country Club Village, a California Limited Partnership; El Portal Gardens, a California Limited Partnership; Fairvalley Villa, a California Limited Partnership; Fallbrook Square Apartments, a California General Partnership; Foothill Gardens, a California Partnership; Foothill Terrace, a California Limited Partnership; Frazier Park, a California Limited Partnership; Grandview Homes, a California Limited Partnership; Hayward Villa, a California Limited Partnership; Kern Villa, a California Limited Partnership; Lake Merritt Apartments, a California General Partnership; Little Tokyo, a California Limited Partnership; Mayflower Arms, a California Limited Partnership; Merced Gardens, a California Limited Partnership; Millbrook Park Apartments, a California Limited Partnership; Monterey Terrace, a California Limited Partnership; Olive Tree Terrace, a California Limited Partnership; Palmdale East Q., a California Limited Partnership; Panorama Park, a Cali-

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*v.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

## OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-14a, is reported at 955 F.2d 1382. The opinion of the district court in the *Alpine Ridge* case, Pet. App. 15a-30a, is reported at 764 F. Supp. 1393; a supplemental order in that case, Pet. App. 32a-39a, is unreported. The opinion of the district court in the *Acacia Villa* case, Pet. App. 40a-60a, is reported at 774 F. Supp. 1240; the final judgment in that case, Pet. App. 61a-63a, is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. A petition for rehearing was denied on May 29, 1992. Pet. App. 64a-66a. On August 18,

1992, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 26, 1992. The petition for a writ of certiorari was filed on September 25, 1992, and granted on November 16, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law." Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057-2059 (codified at 42 U.S.C. 1437f(c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f note (Supp. II 1990)); Section 8(c)(2) of the United States Housing Act of 1937, as added by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, Tit. II, § 201(a), 88 Stat. 663 (codified at 42 U.S.C. 1437f (c)(2) (1982)); and 24 C.F.R. 880.609 and 888.204 are set forth in relevant part in the appendix to this brief.

## STATEMENT

This case involves a constitutional challenge to an Act of Congress that specifies the techniques for adjusting rents in the Section 8 program, a federally subsidized housing initiative. The court of appeals held that the statute, Section 801 of the Department of Housing and Urban Development Reform Act of 1989 (Reform Act), violates the Due Process Clause of the Fifth Amendment by abrogating contracts between the owners of Section 8 housing projects and the United States Department of Housing and Urban Development (HUD).

1. *Background.* In 1974, Congress added the Section 8 program to the United States Housing Act of 1937



(Act). See 42 U.S.C. 1437f. The Section 8 program provides federally subsidized housing to millions of low income tenants by authorizing, *inter alia*, the payment of rent subsidies to private owners and developers of low-income housing. The tenant's rental obligation is based on his ability to pay, while the federal government makes "assistance payments" to the project owner to bring the owner's total rental income up to the prevailing market level. See generally 42 U.S.C. 1437a(a), 1437f(b) and (c).

Under the Section 8 program, HUD enters into standard long-term contracts with project developers and landlords. These are known as "housing assistance payment contracts" or Assistance Contracts. The framework for those contracts is governed by statute. Under the statute, an initial maximum monthly contract rent is established for each dwelling unit; that rent cannot exceed by more than 20 percent the prevailing market rents. 42 U.S.C. 1437f(c)(1). The statute, as originally enacted, also provided for adjustments in the maximum monthly rent in accordance with the following provisions:

> (A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.
>
> * * * * *
>
> (C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

42 U.S.C. 1437f(c)(2)(A) and (C) (1982).[1]

[1] In 1988, Congress amended Section 8(c)(2)(C) of the Act, *inter alia*, by deleting the phrase "assisted and comparable unassisted

The Assistance Contracts implement those provisions by (1) providing that adjustment of rents will be made on the basis of a reasonable formula, but (2) stipulating as an "overall limitation" that, notwithstanding any other provision of the contract, adjustments shall not produce material differences between the rents at comparable assisted and unassisted units.

First, as to the formula-based adjustment, the standard form Assistance Contract in use through 1980 states:

> b. *Automatic Annual Adjustments*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register. * * *
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

Assistance Contract, § 1.9b.[2] The Automatic Annual Adjustment Factors (Adjustment Factors) are generated by

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units" and replacing it with the phrase "assisted units and unassisted units of similar quality and age in the same market area." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(A), 101 Stat. 1850 (1988), codified at 42 U.S.C. 1437f(c)(2)(C). In 1989, Congress amended that phrase by inserting ", type," after the word "quality". Reform Act, § 801(g), 103 Stat. 2059.

[2] The rent-adjustment provisions of the typical original Assistance Contract are reproduced in the appendix to this brief at 7a-9a, *infra*. The original version of the contract, published by HUD as an



HUD's Office of Economic Affairs, which uses two market studies, the Consumer Price Index and the Bureau of the Census American Housing Surveys, to produce a percentage by which the rent will be adjusted. HUD establishes a limited number of Adjustment Factors to cover the entire country. See, *e.g.*, 52 Fed. Reg. 9,478-9,491 (1987) (Adjustment Factors established for four census regions, Alaska and Hawaii, and 72 metropolitan areas).

Second, as to the cap on the formula-based adjustments (required by 42 U.S.C. 1437f(c)(2)(C)), the Assistance Contract states:

> d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government * * *.

Assistance Contract, § 1.9d. HUD regulations also reflect the Secretary's determination to make adjustments in rents based on the Adjustment Factors, subject to an overall cap that adjustments shall not produce material differences from rents at comparable unassisted units, as determined by HUD. See 24 C.F.R. 880.609(c).[3]

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appendix to its regulations for the Section 8 new construction program, 40 Fed. Reg. 18,703 (1975), contains identical language in Section 1.8b. *Id.* at 18,705. The Assistance Contracts in use after 1980 provide that, at the owner's request, contract rents will be adjusted in accordance with HUD regulations. See HUD Form 52522D (8-80), ¶ 2.7, reproduced in the appendix to this brief at 9a-10a, *infra*. Samples of the original and post-1980 contracts were included as Exhibits B and E, respectively, to the Affidavit of Warren J. Daheim in Support of Motion for Summary Judgment, *Alpine Ridge Group v. Kemp*, No. C89-1654R (W.D. Wash., filed Apr. 6, 1990).

[3] That regulation is reproduced in the appendix to this brief at 6a-7a, *infra*. The original regulations adopted to implement the Section 8 new-construction program contain the same provision. See 40 Fed. Reg. 18,687 (1975) (promulgating 24 C.F.R. 880.110(d)).

2. *The* Rainier View *decision.* In the early 1980s, HUD became concerned that application of the Adjustment Factors was yielding rents at some projects that were unduly high in comparison with comparable unassisted units. Accordingly, to comply with the statutory directive to avoid excessive rents and in conformity with the overall limitation provision of the Assistance Contracts, HUD began to undertake, with respect to individual projects, "comparability studies" as a means of determining the rents charged in comparable unassisted units. Those studies would identify three to five comparable projects in a relevant geographic area; the agency would then conduct appraisals to see whether the rents at those projects were materially different from the Section 8 project rents. If the differences were material, the rents determined through the comparability studies would serve as a "cap" to the rental increase produced by the more general Adjustment Factors.

HUD's determination to use comparability studies as a cap to increases produced under the Adjustment Factors led to litigation. Section 8 project owners not only challenged the process by which HUD conducted comparability studies, they also claimed that the use of such studies to limit increases under the Adjustment Factors violated their contracts with HUD. In *Rainier View Assocs.* v. *United States Dep't of Housing & Urban Dev.*, 848 F.2d 988 (9th Cir. 1988) (per curiam), cert. denied, 490 U.S. 1066 (1989), the court of appeals rejected HUD's interpretation of the law and the language of the contracts, and concluded that HUD could not use comparability studies as an independent cap to formula-based rent increases.[4]

[4] Prior to ruling on the merits, the court of appeals voted to hear the case en banc in order to determine a jurisdictional issue: whether the case was a contract action, such that jurisdiction lay exclusively in the Claims Court. In an unpublished order dated March 7, 1988, the en banc court determined that the Claims Court's jurisdiction was not exclusive, because although the case was "contract related," it "rests at bottom on statutory or regulatory rights." See App. to Pet. for Cert. 50a. *United States* v. *Rainier Views Assocs.*, No. 88-1515 (Oct. Term 1988).



The *Rainier View* court stated that Section 8(c)(2)(A) allows HUD to choose *either* the market-survey *or* the reasonable-formula method for adjusting rents, and that "[t]he overall limitation provision [of the statute and the contract] * * * is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments." 848 F.2d at 991. The court found that HUD, having elected to use a reasonable formula in the Assistance Contracts, could not go back on that choice by applying a market-survey cap through the comparability studies. In the court's view, that approach would nullify the formula method that the statute authorizes and that HUD elected. The court also believed that HUD's regulations took the view that the "overall limitation" on rents had to be integrated into the adjustment formula, not superimposed on top of it. *Ibid.*, citing 24 C.F.R. 888.204. In short, *Rainier View* acknowledged that adjustments were limited by comparable rents, but held that comparability determinations had to be considered in creating the formula, not applied as a separate cap.

Shortly before the panel ruled in *Rainier View*, Congress amended Section 8 in a manner that confirmed the permissibility of HUD's use of comparability studies as a separate cap to Adjustment Factor increases.[5] Although the court of appeals was advised of that amendment, it denied rehearing. This Court denied the government's petition for a writ of certiorari. 490 U.S. 1066 (1989).

[5] It did so by adding to Section 8(c)(2)(C) the following sentence: "If the Secretary * * * does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(B), 101 Stat. 1850 (1988), codified at 42 U.S.C. 1437f(c)(2)(C).

3. *The statute at issue in this case. Rainier View* did not end the disputes between HUD and Section 8 project owners over the use of comparability studies. HUD continued to believe that *Rainier View* was wrongly decided and declined to apply that decision outside the Ninth Circuit. Section 8 project owners continued to assert entitlement to automatic formula-based rent adjustments without application of a separate comparability cap. The dispute prompted further litigation, interfered with program administration, and created disparate rent adjustments for projects located in different circuits. In December 1989, Congress enacted Section 801 of the Reform Act [6] with the goal of restoring uniform and appropriate procedures to govern rent adjustments.

The Reform Act sought to "ensure a reasonable rate of return to the owners while effectuating the original congressional objective * * * of avoiding excessive rents and rates of return for section 8 projects." [7] It prescribes new procedures for calculating rent adjustments, both retrospectively and prospectively. The retrospective provisions require HUD to pay landlords an increased amount, above and beyond what the comparability studies required HUD to pay under its interpretation of the contracts. The prospective provisions establish a limited role, under defined criteria, for HUD's future use of comparability studies.

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[6] Pub. L. No. 101-235, 103 Stat. 2057-2059 (codified at 42 U.S.C. 1437f(c)(2)(C) (Supp. II 1990) and 42 U.S.C. 1437f note (Supp. II 1990)).

[7] 135 Cong. Rec. S16,602 (daily ed. Nov. 21, 1989) (remarks of Sen. D'Amato). The Senate Banking, Housing, and Urban Affairs Committee explained that "[t]he Committee did not * * * share the Ninth Circuit's interpretation of HUD's authority to perform individualized comparability studies. Clearly, a market reality test must be an integral component of the Section 8 program to ensure that HUD pays reasonable rents." 135 Cong. Rec. S16,600 (daily ed. Nov. 21, 1989).



a. *Section 801(a): Retrospective payments.* To deal with HUD's prior use of comparability studies, the Reform Act provides for increased rental payments to certain Section 8 project owners. § 801(a), 103 Stat. 2057-2058. The provision applies to owners whose rental adjustments were limited because of HUD's use of a comparability study as an independent cap, as well as to owners who did not request rental readjustments because they anticipated that HUD would reduce their project rents.[8]

For the period from fiscal year 1980 until the date when HUD promulgates new regulations to govern future rental adjustments, the provision requires HUD to calculate rental adjustments in an amount equal to the Adjustment Factor times the portion of the contract rent other than that used for debt service. At the request of an owner, HUD is then to pay the amount by which that rental-adjustment figure exceeds the rental adjustments actually approved by HUD for the relevant years. In no event, however, is such a retroactive payment to be less than 30 percent of the Adjustment Factor times the full contract rent, less rental subsidies actually approved. In short, this provision requires HUD retroactively to increase, to at least 30 percent of the Adjustment Factor level, payments made to owners whose adjustments were limited by comparability studies.[9] HUD has issued detailed regulations to govern the process of making such retroactive payments. 56 Fed. Reg. 20,078 (1991). In

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[8] Section 801(a) is expressly made inapplicable to projects covered by a prior final judgment in litigation over the authority of the Secretary to use comparability studies to limit rental adjustments. § 801(a)(2)(B), 103 Stat. 2058.

[9] Furthermore, the Reform Act provides that, at a project owner's request, HUD will make a one-time redetermination of the contract rent as a basis for future rent adjustments. § 801(d), 103 Stat. 2058-2059. Under that provision, the contract rent will be the

addition, Congress has separately appropriated in the past three fiscal years a total of $210 million for such payments.[10]

b. *Section 801(c): Prospective comparability regulations.* For the future, the Reform Act requires HUD to promulgate "regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments * * * would result in such material differences" between assisted and unassisted units, and to use those studies to establish a "modified annual adjustment factor" for a geographically smaller area. § 801(c), 103 Stat. 2058. The statute describes in detail the methodology to be used by the Secretary in conducting such comparability studies. It also stipulates that if a modified adjustment factor cannot be established or fails to eliminate material differences between rents at comparable assisted and unassisted units, the Secretary may apply another methodology "for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units." *Ibid.* In keeping with those provisions, HUD has proposed regulations to govern the conduct and use of comparability studies to generate modified adjustment factors, and, in cases in which such factors are not effective, to provide for a system of adjusting rents through comparability studies. 57 Fed. Reg. 49,120 (1992).

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greater of (a) the currently approved contract rent, or (b) the contract rent as calculated under the retroactive provisions in Section 801(a).

[10] See Pub. L. No. 102-389, 106 Stat. 1583 (1992) (appropriating $70,000,000 for fiscal year 1993); Pub. L. No. 102-139, 105 Stat. 745 (1991) (appropriating $70,000,000 for fiscal year 1992); Pub. L. No. 101-507, 104 Stat. 1357 (1990) (appropriating $1,810,442,000 for fiscal year 1991, $70,000,000 of which was for retroactive payments, see H.R. Conf. Rep. No. 900, 101st Cong., 2d Sess. 15 (1990)).



4. *The present controversy.* Respondents are developers and owners of Section 8 projects. They brought challenges to the constitutionality of Section 801 of the Reform Act, contending that their Assistance Contracts, as construed in *Rainier View*, entitled them to rent increases in accordance with the full Adjustment Factors, because HUD had applied comparability studies as separate caps, rather than factoring them into the formulas themselves. They further claimed that Section 801 had altered that contract right in violation of the Due Process Clause of the Fifth Amendment. The United States District Courts for the Western District of Washington and the Central District of California, in separate cases, declared Section 801 unconstitutional, Pet. App. 15a-31a, 40a-63a, and the government appealed.

The court of appeals consolidated the two cases and affirmed. Pet. App. 1a-14a. The court first held that it was bound by *Rainier View*'s contractual holding that comparability studies could not be used as separate caps to rent increases under the Adjustment Factors. The court declined to revisit that holding notwithstanding the fact that amendments to the Section 8 program revealed that Congress had intended comparability studies to serve as separate caps to such rent increases. Pet. App. 6a-8a.

The court of appeals then determined that the owners' contractual rights to rent increases under the Adjustment Factors were "vested" property rights. Pet. App. 8a-12a. The court acknowledged the principle that Congress retains authority to legislate in ways that affect government contracts unless that power is "surrendered in unmistakable terms," Pet. App. 9a, quoting *Peterson* v. *United States Dep't of Interior*, 899 F.2d 799, 808 (9th Cir.) (quoting *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)), cert. denied, 111 S. Ct. 567 (1990). The court also acknowledged that Congress may enact "curative" legislation that affects property rights. Pet. App. 10a-11a.

Nevertheless, the court held that those principles are not applicable here, because "HUD *explicitly* limited its statutory options * * * and bound itself to that choice" by entering into contracts with the owners that are "supported by independent consideration." *Id.* at 10a, 12a. Accordingly, the court stated that the owners acquired a vested right to use of the "formula methodology for adjusting rents." *Id.* at 12a.

Finally, relying on *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935), the court of appeals found that Section 801 had unconstitutionally altered respondents' contract rights solely to save the government money. Pet. App. 12a-14a. The court rejected the contention that Section 801 had the valid purpose of clarifying that respondents are wrong in claiming entitlement to rent increases based on the Adjustment Factors free from the "overall limitation" cap. It also dismissed the argument that Section 801 is constitutionally valid as a measure designed to resolve the continued dispute over the proper method for adjusting rent increases in the Section 8 program. The court therefore concluded that Section 801 "unconstitutionally abrogates the owners' vested property rights in violation of the [F]ifth [A]mendment." Pet. App. 14a.

## SUMMARY OF ARGUMENT

The court of appeals' holding that Section 801 of the HUD Reform Act impaired vested contract rights, in violation of the Due Process Clause, raises three legal issues: first, whether the asserted contract rights exist; second, whether the alleged impairment of those rights is substantial; and third, whether any substantial impairment is justified in the light of the nature of the statute and its legislative purposes. In this case, none of the three required showings has been made; accordingly, this Court should uphold the constitutionality of Section 801.



I. The initial issue is whether project owners in the Section 8 program have a contract right to annual rent increases in accordance with a published formula, without application of a separate cap based on the results of a market survey (known as a comparability study). If the owners lack such a contract right, their claim that Section 801 impairs it is unfounded. The answer to that question is plain: the contracts provide, as an "overall limitation," that "[n]otwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government." Assistance Contract, § 1.9d.

Under that provision, HUD has the clear right to override formula-based adjustments in order to achieve the "overall" requirement of comparability. The claimed contract right to be free from separate comparability caps is therefore inconsistent with the contract's unambiguous language. Nor does the claimed right find support in the underlying statute or the regulatory background. Because the contract right on which respondents based their challenge to Section 801 does not exist, that provision does not infringe their due process rights.

II. A. On the assumption that respondents have the contract right they claim, Section 801 does not work a substantial impairment of that right. On a retroactive basis, Section 801 puts the owners in a better financial position than they would have occupied if HUD had understood the requirement of incorporating the results of comparability studies into the factors governing rent adjustments. On a prospective basis, Section 801 does little more than modify the procedures for adjusting rents, without changing the owners' financial rights. Such a procedural change that leaves the owners' economic rights intact is not of constitutional dimension.

B. Even if the impairment of contract rights is viewed as substantial, Section 801 is valid. The statute is neither arbitrary nor irrational in light of its purposes: to cure the Ninth Circuit's unexpected interpretation of the contracts and to restore uniformity to the program's operation. Section 8 landlords have no equitable claim to keep the windfall benefits of a contract that was never intended to pay above-market rents. Nor can they complain about the prospective revision of procedures that reinforces the program's original, and continuing, market-rent premise.

Given that context, the court of appeals erred in finding that Section 801 impairs vested rights solely for the purpose of saving money. That analysis of Congress's purposes is mistaken. This case differs from those in which Congress abrogated the terms of a government debt simply to reduce expenses. Here, Congress confronted a situation in which inconsistent standards were harming the uniform operation of a national social welfare program, and it resolved to steady the program through a law that reasonably compromised the competing interests. There was no total repudiation of government contracts; rather, in Section 801, Congress carefully tailored its action to minimize any intrusion on contract rights. Because Section 801 is rationally designed to achieve a permissible regulatory purpose, the statute satisfies the requirements of the Due Process Clause.



## ARGUMENT

### SECTION 801 OF THE HUD REFORM ACT DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF SECTION 8 PROJECT OWNERS

The Due Process Clause of the Fifth Amendment protects against deprivations of "life, liberty, or property, without due process of law," U.S. Const. Amend. V, and contract rights may constitute property rights. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 278 n.31 (1969); *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). As this Court has explained:

> To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, the party complaining of unconstitutionality has the burden of demonstrating, first, that the statute alters contractual rights or obligations. If an impairment is found, the reviewing court next determines whether the impairment is of constitutional dimension. If the alteration of contractual obligations is minimal, the inquiry may end at this stage; if the impairment is substantial, a court must look more closely at the legislation.

*National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 472 (1985) (citations omitted); see *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1109 (1992).

The court of appeals concluded that Section 801 of the HUD Reform Act impairs respondents' contract rights and that the impairment violated the Constitution. That conclusion is wrong for three reasons. First, respondents lack the contract rights on which they based their challenge to Section 801. Second, even if those rights existed, Section 801 did not substantially impair them. And, finally, any substantial impairment found in this case is justified in light of Congress's important purpose

to reinstate the market-rent premise of the Section 8 program and to restore uniformity to the program's operation.

## I. SECTION 8 PROJECT OWNERS HAVE NO CONTRACT RIGHT TO ANNUAL RENT INCREASES WITHOUT APPLICATION OF AN INDEPENDENT COMPARABILITY CAP

The threshold issue in this case is whether, as the court of appeals held in *Rainier View*, Section 8 project owners have a contract right to rent increases under the Adjustment Factors without application of a separate comparability cap. In light of the unequivocal contract language and its statutory and regulatory background, *Rainier View*'s holding that the Assistance Contracts prohibit HUD's use of a separate comparability cap is untenable.[11]

### A. The Assistance Contracts Authorize An Independent Comparability Cap

Section 1.9b of the Assistance Contract states that HUD will publish annual adjustment factors, and will adjust rents by applying those factors to contract rents. Section 1.9d, however, subjects that procedure to what is explicitly termed an "*overall limitation*" that trumps the formula when the formula would produce above-market rents—"*Notwithstanding and other provisions of this*

[11] The three courts outside of the Ninth Circuit that have considered constitutional attacks against Section 801 have each concluded that *Rainier View* is wrong. Those courts have found that project owners do *not* have a right to the full formula adjustment regardless of the results of a comparability study. Accordingly, those courts have held that Section 801 has not deprived landlords of constitutionally protected contract rights. *Carmichaels Arbors Assocs.* v. *United States*, 789 F. Supp. 683 (W.D. Pa. 1992), appeal stayed pending resolution of this case, No. 92-3326 (3d Cir.); *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738 (D. Colo. 1991); *National Leased Housing Ass'n* v. *United States*, 22 Cl. Ct. 649 (1991), appeal pending, No. 92-5064 (Fed. Cir.).



*Contract*, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government" (emphasis added). That language clearly states that the requirement of avoiding material differences takes precedence over all other contractual provisions: it is an "overall limitation."

The "overall limitation" provision plainly authorizes "comparability studies" as a means of keeping rent adjustments in line with comparable projects. The published Adjustment Factors, while adjusting rents by a presumptively reasonable amount, cannot assure that for each specific project the formula-based rent increases will avoid material differences between assisted and comparable unassisted units. For example, many projects are covered by the Adjustment Factor for one of the four national Census Regions.[12] While "[o]n average, the Census Region [Adjustment Factors] used for such areas are statistically reliable, * * * [the] use of a [single] factor to cover such a large area can conceal significant local differences." 57 Fed. Reg. 49,121 (1992).[13] It was to address such local differences that HUD developed the comparability-study approach.

[12] HUD currently produces Adjustment Factors for the four Census Regions (Northeast; North Central; South; and West) and for 74 metropolitan areas. "Projects within one of these metropolitan areas receive the corresponding [Adjustment Factor]. Other projects receive the [Adjustment Factor] for their respective census region. Thus, 78 [Adjustment Factors] determine rent changes in every project in the country which has rents adjusted on the basis of annual adjustment factors." HUD, *Report to Congress on the Adjustment of Contract Rents Under Section 8(c)(2)(C) of the United States Housing Act of 1937*, at 2 (July 27, 1990) [HUD Report]. We have lodged copies of the HUD Report with the Clerk of this Court.

[13] For example, a single Census Region covered both "the depressed market conditions that prevailed in much of the Pacific Northwest during the early 1980's" and "the hyperinflated housing markets of southern California." HUD Report, *supra*, at 7.

When it suspected that Adjustment-Factor increases might be excessive, HUD surveyed rents at three to five comparable projects in a relevant geographic area.[14] If the results of the comparability study revealed no material differences between the assisted and unassisted projects, HUD applied the Adjustment Factors to adjust rents; if, however, material differences were discovered, HUD capped the rent increase so that it did not materially exceed comparable rents at unassisted projects.[15]

Each of the Section 8 project owners signed an Assistance Contract specifying that rent adjustments were sub-

[14] The process worked as follows:

> HUD field staff were to select three to five projects that were used in performing the "rent reasonableness" test when the initial contract rents were set. When original projects were not available or no longer comparable, the field staff were to use comparable projects, *i.e.*, unassisted projects located in the same geographic area of similar construction and with similar amenities and services. Once the comparable projects were selected, HUD field staff were to use acceptable appraisal techniques to adjust the rents of each comparable project so as to make the comparable projects as close as possible to the subject project.

*National Leased Housing Ass'n*, 22 Cl. Ct. at 657.

[15] Alpine suggests (Br. in Opp. 7 n.12, 11-19) that HUD's "real purpose" in using comparability studies was to erase differentials between contract rents and rents at comparable unassisted projects that were established in the original agreements (see note 22, *infra*). There is no merit to that suggestion. The contract provides that the comparability "limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents." Assistance Contract, § 1.9d. HUD protected against erosion of the initial difference by applying the comparability cap only when the Adjustment Factor produced a *materially* different rent increase from a comparability study, and "[a] material difference exists whenever the adjusted Section 8 rent would *exceed* 120 percent times the sum of the comparable rent and the initial difference." *National Leased Housing Ass'n*, 22 Cl. Ct. at 661 (quoting 1986 HUD memorandum; emphasis added by court). Thus, HUD's materiality test preserved the initial difference.



ject to the "overall limitation" clause. The language of that provision clearly expresses the requirement that adjustments that result in material differences between assisted and unassisted projects will not be made, and it necessarily envisions that HUD will conduct a survey of some kind in order to determine the prevailing rent levels in the unassisted market. In the face of the "overall limitation" provision, there is no credible claim that project owners enjoyed an unqualified right to the full Adjustment Factor rental increase each year, regardless of how out-of-line that increase might have been with rents at comparable unassisted projects.[16]

The *Rainier View* court stated that the only use the contract allows HUD to make of comparability studies is to employ them in modifying the Adjustment Factors. 848 F.2d at 991. But the contract language contains no such statement.[17] Rather, the contract states that the com-

[16] Three courts have so read the contract language. See *National Leased Housing Ass'n*, 22 Cl. Ct. at 659 ("The title 'Overall Limitation' and the phrase '[n]otwithstanding any other provisions of this Contract' indicate very precisely that the limitation in paragraph 1.9d is paramount; that it overrides any other provision in the contract, including paragraphs 1.9b and 1.9c, that otherwise would result in a rent adjustment that would produce a material difference from rents charged for comparable unassisted units."); *Sheridan Square Partnership*, 761 F. Supp. at 743 ("The language is clear; the [overall limitation] paragraph is meant to trump conflicting provisions."); *Carmichaels Arbors Assocs.*, 789 F. Supp. at 688 ("[S]tated another way, [the overall limitation paragraph provides that] no matter what any other section in the contract says, no rental adjustment can materially exceed rents paid for comparable unassisted units. Under [that language] * * * its mandate may and must be carried out even if this action violates every other provision of the contract.").

[17] "[T]here is no provision in the contracts that obliges HUD to follow any particular procedure for setting the rent adjustments after it has conducted a comparability study and quantified the rents charged for comparable unassisted units. Thus, nothing in the contract language specifically obliges HUD to translate the results of a

parability limit on rent adjustments shall govern "[n]otwithstanding any other provisions of this Contract." Assistance Contract, § 1.9d. That provision puts project owners on notice that, regardless of all else in the contract, rents will not be adjusted materially above the level of comparable unassisted units "as determined by the Government." *Ibid.* In short, the contract language conclusively establishes the permissibility of independent comparability caps.

### B. The Statutory Background Confirms The Validity Of HUD's Use Of Comparability Studies

Examination of the Housing Act further supports HUD's authority to apply a separate comparability cap to rent increases generated by the Adjustment Factors.

1. When the Assistance Contracts were signed, the Act stated that contracts in the Section 8 program shall provide for rental adjustments "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. 1437f(c)(2)(A) (1982). The Act added the independent requirement, however, that rental adjustments "as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. 1437f(c)(2)(C) (1982).

Those provisions required the Secretary to ensure comparability, but did not prescribe the methodology for achieving that result. Nor does the legislative history illuminate that issue.[18] Because the statute affords the

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comparability study into modified [Adjustment Factors] and then to set the amount of rent increases based on such [modified Adjustment Factors]." *National Leased Housing Ass'n*, 22 Cl. Ct. at 659.

[18] The comparability limitation originated in the House bill. See H.R. 15361, § 201, 93d Cong., 2d Sess. (1974). The House committee report explained that the rent adjustment provisions were designed to allow project owners to offset reasonable costs they incurred, while imposing "strict conditions that will assure that higher costs resulting from inefficient management practices are not compensated by increases in either the subsidy or in the amount of rent paid by a tenant." H.R. Rep. No. 1114, 93d Cong., 2d Sess. 21-22 (1974). The section-by-section analysis states only that "authorized adjustments in maximum rents could not result in material differences between the rents charged for assisted and comparable unassisted units," *id.* at 59, without discussing methodology.



Secretary discretion about how to fulfill the requirement that material differences be avoided, the Secretary had authority to adopt a reasonable interpretation of that requirement that is consistent with the Act. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). HUD's decision to use comparability studies as separate caps was both reasonable and permissible under the Act.

The comparability cap reasonably seeks to accomplish the statutory objective: the avoidance of material differences for a particular project. The alternative that the court of appeals favored—recomputation of the Adjustment Factors in response to the results of a comparability study—would be an inordinately burdensome way to achieve the result mandated by the statute. As discussed above, the Adjustment Factors cover broad geographic areas. The finding that the Adjustment Factors do not adequately reflect changes in rent levels for a particular Section 8 project does not mean that the Factors are inadequate for other projects. Changes in housing costs reflect local economic conditions, and there may be no need to revise the Factors as a general matter in response to the discovery of disparities involving individual projects. Moreover, any change in the composition or methodology of the Factors made to accommodate a particular comparability study may produce anomalous results for

another Section 8 project governed by the same Factors. Accordingly, "it could be difficult and costly for HUD to make an optimal adjustment to a formula covering a broad geographic area based on the results of one comparability study that focuses on one Section 8 project." *National Leased Housing Ass'n*, 22 Cl. Ct. at 662 n.10.

Under the statute, the ultimate financial test is comparability, and the economic consequences to any particular owner are identical whether HUD modifies the Adjustment Factors in light of a comparability study or applies the comparability study directly as a cap. No matter which methodology HUD employs, the bottom line for the owner would be the same: the adjustment would not produce rents materially in excess of rents at comparable unassisted projects. Nothing in the statute suggests that Congress was concerned about which methodology HUD employed to reach that result.

Not only is the Secretary's interpretation of the Housing Act valid under *Chevron*, it was ratified by Congress's action in the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2)(B), 101 Stat. 1850 (1988). That amendment provided that if HUD did not submit a comparability study to a Section 8 owner within 60 days of the anniversary date of the contract, the full Adjustment Factor would apply. See note 5, *supra*. That provision, of course, presupposes the validity of HUD's use of a comparability study as a separate cap. Section 801 likewise confirms the permissibility of separate comparability caps. A statutory amendment authorizing continuation of the agency's approach is "virtually conclusive" in interpreting the statutory scheme. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986); *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91-92 (1958).

2. Respondents suggest that "background facts," "real life context," and "attitudes of the [Section 8 project]



owners" support the claim that project owners had a settled expectation that rents would be "adjusted by multiplying the previous year's rent by a published inflation factor" and that there would be no "case-by-case rent adjustments." Acacia Br. in Opp. 2, 4, 12; see Alpine Br. in Opp. 2-3. In light of the clear language of the contract and statute, that contention is difficult to accept. Whatever respondents claim to have believed about the Section 8 program, Section 1.9d of the contract informed them that a comparability standard was to be implemented as an "overall limitation," taking precedence over everything else in the contract. Respondents cannot now rely on their impressions to the contrary.[19] See *Kihlberg* v. *United States*, 97 U.S. 398, 402 (1878) ("The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument.").

Moreover, quite apart from the fact that respondents' impressions are legally irrelevant, their assertion (Acacia Br. in Opp. 3-4; Alpine Br. in Opp. 2-3; J.A. 29-30, 32, 36-37) that HUD led developers to believe that the Adjustment Factors would apply automatically and without regard to the results of comparability studies for a particular project is factually inaccurate. In getting the Section 8 program underway, HUD explained to developers that comparability studies would serve as a cap to formula-based increases. In 1984, Charles L. Edson,

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[19] The Assistance Contract contains an integration clause (§ 1.1g) that states: "This Contract including said exhibits, comprises the entire agreement between the parties hereto, and neither party is bound by any representations or agreements of any kind except as contained herein." 40 Fed. Reg. 18,703 (1975) (setting forth standard Housing Assistance Payments Contract). This provision makes explicit the established principle that a "written contract merge[s] all previous negotiations, and is presumed, in law, to express the final understanding of the parties"; parol evidence cannot be used to vary the terms of the agreement. *Simpson* v. *United States*, 172 U.S. 372, 379 (1899).

counsel to the National Leased Housing Association, testified to a congressional committee that

> in structuring section 8, Congress meant it to be a market program. Rents would rise by either the fair market rents in the area, or a reasonable formula which as our legislative history shows was the CPI, *but there was a cap, a market discipline cap, and that is where comparabilities came in. Rents could not exceed the rents of a comparable project in the area.* [20]

In meetings around the country, HUD explained this process to prospective Section 8 developers:

> HUD was very anxious to get [the program] off the ground and it pointed out to developers at many meetings throughout the country of this marvelous rent devise [*sic*], of this escalation procedure where there would not be a cost review, but instead you would just go up by the market index capped only by comparability. [21]

In light of that description of HUD's promotional efforts by an informed industry representative, respondents' current claim that they anticipated automatic, above-market rent increases must be taken with a grain of salt.

### C. The Rationale Of *Rainier View* Is Incorrect

Despite all of the foregoing, the *Rainier View* court concluded that HUD is prohibited from using comparability studies as an independent cap to the Adjustment

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[20] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. 21 (1984) [1984 House Hearings] (emphasis added).

[21] 1984 House Hearings, *supra*, at 21 (testimony of Charles L. Edson).



Factors. That conclusion rests on a flawed interpretation of the contracts and the statutory scheme as a whole.

1. The premise of *Rainier View* is that if the "overall limitation" provision were read to authorize the use of separate comparability caps, it would nullify HUD's election, under Section 8(c)(2)(A) of the Act, to use a formula used to adjust rents, not an independent basis for making annual rent adjustments." 848 F.2d at 991. must be read as a restriction on "the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments." 848 F.2d at 991.

The *Rainier View* court erred in asserting that the use of comparability studies nullified HUD's election of the formula method. HUD's limited use of comparability studies did not abandon the Adjustment Factor approach. First, for all projects, the factor-based adjustment was HUD's starting point, and in the majority of cases, that was the ending point as well. Second, HUD's comparability studies differ significantly from the "fair market rental" (FMR) method, the alternative way to adjust rents described in Section 8(c)(2)(A). That method refers to the process for establishing the initial contract rent.[22] 42 U.S.C. 1437f(c)(1). HUD determines FMRs from surveys of rents in a large number of units in broad geographic areas.[23] See 24 C.F.R. 888.103; 53 Fed.

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[22] The statute states that the "maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market"; however, the maximum rent may exceed the FMR by up to 20 percent "where the Secretary determines that special circumstances warrant such higher maximum rent." 42 U.S.C. 1437f(c)(1). In addition, HUD regulations apply a rent-reasonableness test based on market comparisons. 24 C.F.R. 880.204(b)(1)(ii).

[23] HUD establishes FMRs for 344 geographic areas nationwide. The FMRs are derived from surveys of at least 12 recently constructed projects of each structural type of housing in a particular geographic area. Following the determination of those rents, HUD

Reg. 14,954 (1988). The comparability studies, in contrast, focus on three to five units comparable to a particular project in a relevant geographic area; they do not establish a rent level for a general area. HUD's limited use of comparability studies therefore did not constitute a switch to the "fair market rental" method and did not nullify the formula approach.

Not only was the court's nullification argument unfounded, the court failed to give effect to the plain language of the statute. To reiterate, the Act provided that "[a]djustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. 1437f (c)(2)(C) (1982). That provision operates as an overall constraint on rent adjustments, but does not impose a constraint on the means used by the Secretary to achieve the goal of comparability. Nothing in the statute required HUD to revise the formula, rather than to apply comparability studies directly to limit rents.[24] The court should therefore have applied the "overall limitation" as written: HUD may take any steps, "[n]otwithstanding any other provisions of this Contract," to avoid material differences in the adjustment of rents. Assistance Contract, § 1.9d.

2. The only other basis that the *Rainier View* court gave for its holding was a HUD regulation, 24 C.F.R. 888.204, that discusses interim revisions of the Adjustment Factors. 848 F.2d at 991.[25] That regulation, however, does not support the court of appeals' conclusion that HUD construed the statute as precluding use of a separate comparability cap. *Ibid.*



First, the regulation simply authorizes HUD to consider producing a revised interim adjustment factor; it does not compel HUD to take that approach in order to avoid "material differences." Rather than implementing the comparability requirement of the statute, the regulation exercises HUD's statutory authority to provide for formula-based adjustment of rents "annually or more frequently." 42 U.S.C. 1437f(c)(2)(A). Second, the regulation by its terms is not applicable when the Adjustment Factors are producing too *high* an adjustment; it applies only when the Adjustment Factors are producing too *low* an adjustment. Accordingly, the regulation was not promulgated to address the situation in this case (comparability studies that reveal excessive increases), and it did not restrict the agency's flexibility to deal with that problem.

Third, HUD has never interpreted 24 C.F.R. 888.204 in the fashion that the court of appeals suggested. Rather, another regulation, 24 C.F.R. 880.609(c)—which has always been part of the Section 8 program (see note 3, *supra*)—fully supports HUD's use of comparability studies. That regulation states, in pertinent part:

> *Overall limitation.* Any adjustment of contract rents for a unit after Contract execution * * * must

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sets FMRs at the 75th percentile of area rent levels, and trends the data ahead two years in order to reflect changes anticipated in those rents. See *National Leased Housing Ass'n*, 22 Cl. Ct. at 656-657.

[24] To the extent that Section 8(c)(2)(C) is viewed as "ambiguous with respect to the specific issue" of whether a comparability study could be used as an independent limitation, HUD's interpretation of that language to authorize separate comparability caps is a reasonable one that is entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843.

[25] The regulation states that when the Adjustment Factors would produce rents "that are substantially lower than rents charged for comparable units not receiving assistance" and a project owner establishes that "the costs of operating comparable rental housing have increased at a substantially greater rate than the Adjustment Factors," HUD "will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area." 24 C.F.R. 888.204 (reproduced in the appendix to this brief at 7a, *infra*).

> not result in material differences between the rents charged for assisted units and comparable unassisted units * * *.

That regulation confirms the agency's view that Section 8(c)(2)(A) authorizes an overall and independent comparability limitation on rent adjustments.

HUD's interpretation of its own regulations is entitled to great deference. See *Martin* v. *Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1175-1176 (1990); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). The court of appeals violated that principle in imposing an interpretation on HUD that conflicts with the language and purpose of HUD's own regulation; ignores the agency's more relevant comparability rule; and contradicts the agency's long-held interpretation of its powers.

* * * *

In sum, *Rainier View*'s discovery of a contract right to formula-based rent increases without application of an independent comparability cap is fundamentally wrong. As a result, the court of appeals' holding that Section 801 is unconstitutional, which is predicated on the assumption that respondents had that contract right, is also wrong. Because respondents never had a contract right to be free from separate comparability studies, Congress infringed no contract rights by enacting Section 801.

## II. IF SECTION 8 PROJECT OWNERS HAVE VESTED CONTRACT RIGHTS, SECTION 801 DOES NOT UNCONSTITUTIONALLY IMPAIR THEM

Even if the Assistance Contracts bore the meaning given them in *Rainier View*, the court of appeals' substantive due process holding—that Section 801 unconstitutionally impairs vested contract rights—could not stand. "For it is not every modification of a contractual promise that impairs the obligation of contract under federal law." *El Paso* v. *Simmons*, 379 U.S. 497, 506-507 (1965). Two further showings are necessary: the impairment must be substantial, and, if substantial, the impairment must be unjustified. *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 472 (1985). In this case, neither showing has been made.



### A. The Changes Made By Section 801 Do Not Substantially Impair Respondents' Rights

Section 801 is far from a wholesale repudiation of HUD's obligations to Section 8 project owners. The provision leaves intact the government's fundamental obligation to honor its contracts and to pay annual rent adjustments.[26] It also leaves intact the rules governing the ultimate amount of the payment to which Section 8 landlords are entitled—except on a retrospective basis, where Congress *increased* the amount of the payments that HUD must make. Against that background, even assuming the correctness of *Rainier View*, the incidental modifications of process and procedure made by Section 801 do not constitute substantial contractual impairments.

1. *Retroactive provisions.* For past periods the Reform Act improves the situation of owners whose rents were limited by comparability studies. Under Section 801(a), owners whose payments did not reach the full Adjustment Factor level because of comparability limits and owners who did not apply for adjustments because of a concern that rents would be reduced may apply to

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[26] Section 8 project owners retain their rights to (1) payment of the "lion's share" of rent by the government on behalf of project residents; (2) rent adjustments that preserve the initial difference between the contract rent and market rates when the contract was signed; (3) rent adjustments to reflect tax, utility, or other costs not adequately covered by market-based adjustments; and (4) assurances that the contract rent "will never drop below the original fixed rate." *Sheridan Square Partnership*, 761 F. Supp. at 746; 42 U.S.C. 1437f(c). All of those contract benefits and protections against market risk are left unaffected by Section 801.

HUD for retroactive payments. Such owners are guaranteed retroactive payments of no less than 30 percent of the Adjustment Factors, even where HUD's comparability studies indicated that comparable, unassisted units in the area had experienced lesser rent increases. Reform Act, § 801(a), 103 Stat. 2057-2058. That procedure is not burdensome to owners, and, more importantly, it puts them in a better financial position than their contracts guaranteed.[27]

Although respondents now claim the right to substantial windfall payments resulting from the full Adjustment Factor increase with no comparability limitation, that was not the right that their contracts, even as construed in *Rainier View*, conferred. The *Rainier View* court agreed with HUD that the agency was entitled to impose comparability limitations on rent adjustments; the disagreement was over the *procedure* by which HUD was required to take account of comparability. Although HUD's procedure was ultimately rejected by the Ninth Circuit, Section 8 project owners never had an expectation—under any view of the contracts—that the original Adjustment Factors would be applied if the Factors were deviating materially from rent increases at comparable unassisted projects. The only contractual expectation under their view was that HUD would have to modify the Factors to avoid such material differences.

Congress's requirement that HUD must retroactively modify its calculation of payments to owners is consistent with that contract-based right. Congress could have determined to restore the parties to the position they would have occupied had HUD complied with the *Rainier View* procedural approach all along, and thereby given re-

[27] Congress's decision to put the owners in a better position was likely a response to the owners' complaints that "HUD field offices applied inconsistent, unpredictable, and erratic procedures when assessing comparability and determining the proper amount of rent adjustments." *National Leased Housing Ass'n*, 22 Cl. Ct. at 657 n.7.



spondents all of the financial fruits that the contract provided.[28] Instead, Congress required HUD to make a *higher* payment to Section 8 project owners than the comparability studies indicated was appropriate. Because respondents' central right was to payment of a sum of money that was always limited by the standard of comparability, Section 801's requirement of a higher payment does not impair their substantial rights.[29]

2. *Prospective provisions.* For future periods, Section 801(c) requires HUD (where the agency has reason to believe that the formula adjustments are inaccurate) to use comparability studies to produce a modified adjustment factor for a smaller geographic area. That is a similar approach to what the *Rainier View* court had required HUD to do. Where that modification of factors is not feasible or fails to accomplish the objective of comparability, the statute permits HUD to use another method of applying comparability studies. The statute

[28] Indeed, if the *Rainier View* court had remanded to the agency for recomputation of payments to Section 8 owners under what the court saw as the correct approach (*i.e.*, by adjusting "the formula factors in light of market conditions," 848 F.2d at 991), respondents could not have complained: they would have received exactly what the contract (in their view) granted them. The court's failure to order such a remand does not mean that respondents had a contract-based entitlement to payment of a greater sum of money (*i.e.* the full Adjustment Factor formulas without any consideration of comparability); that was not the financial result for which they contracted.

[29] In granting supplemental payments to owners, Section 801(a) established the "exclusive method" for making retroactive payments, 103 Stat. 2058, and thereby foreclosed litigation over the methodology and results of past comparability studies. The termination of the right to litigate such administrative issues, in exchange for a significant additional payment to owners, is not the deprivation of a substantial right. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 & n.32 (1978).

does not specify that method.[30] Reform Act, § 801(c), 103 Stat. 2058. Respondents' substantial rights are not modified by those provisions.

As an initial matter, Congress has authority to legislate prospectively with respect to the administration of government contracts. This Court has noted that "sovereign power * * * is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (*POSSE*), quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). In this case, neither respondents nor the court of appeals pointed to an "unmistakable" surrender of Congress's right to enact legislation affecting the Assistance Contracts. Section 8 owners, like participants in other federally subsidized housing programs, were well aware that the program was subject to congressional oversight and action. As this Court remarked about a similar housing program, "[t]hose who do business in the regulated field cannot object if the legislative scheme

[30] Rather than encourage separate comparability caps, Congress required HUD to report to it "on the feasibility and desirability, and the budgetary, legal, and administrative aspects, of adjusting contract rents * * * on the basis of any alternative methodologies that are simpler in application than individual project comparability studies." § 801(f), 103 Stat. 2059. In response, HUD reported that (1) the Adjustment Factor system could be improved by conducting telephone surveys of the metropolitan and nonmetropolitan areas of the ten HUD regions; (2) it would be prohibitively expensive to collect highly localized CPI data or to survey areas not covered by CPI data to determine comparable rents; and (3) for certain individual projects, targeted comparability studies "carried out in an objective and uniform manner" can accurately identify material differences between comparable assisted and unassisted rents. HUD Report, *supra*, at 3-7. HUD's proposed regulations would implement the recommendations in the report. 57 Fed. Reg. 49,120 (1992). "Until a final rule is published on the future use of comparability studies, section 8 contract rents will be adjusted by applying the full [Adjustment Factors]." 56 Fed. Reg. 20,078 (1991).



is buttressed by subsequent amendments to achieve the legislative end." *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958).[31]

Moreover, in reaffirming the essential use of published adjustment factors to govern rent increases, and in requiring HUD to modify those factors based on comparability studies as the first-level response when factors are materially out-of-line with the rents at unassisted projects, the statute is entirely consistent with the contract rights respondents claim.[32] The only respect in which the statute alters those rights is by authorizing an alternative mechanism in the event that the modified factor fails. Even then, however, the statute does not alter the financial rights of owners under their contracts; the contract continues to give owners the right to annual rent adjustments, provided that they do not materially exceed rents at comparable unassisted projects.[33]

[31] In the *Sinking-Fund Cases*, 99 U.S. 700, 721 (1879), the Court stated that Congress "cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into." To the extent that that statement recognizes the prospective power of Congress to modify the government's contracts, it is consistent with the modern view of congressional authority. Developments in the law since the *Sinking-Fund Cases*, however, have made clear that the Due Process Clause does not totally bar legislation simply because it affects property rights retroactively. *General Motors Corp.* v. *Romein*, 112 S. Ct. at 1112; *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989).

[32] The statute also responds to owners' complaints about HUD's methodology, see note 27, *supra*, by requiring the agency to promulgate nationwide regulations to govern comparability studies, and by requiring that the studies must consider "the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area." § 801(c), 103 Stat. 2058.

[33] Acacia argues (Br. in Opp. 12) that, even if owners do not suffer financial injury under Section 801, "the owners would still be

Under those circumstances, a finding of substantial impairment would be possible only if the procedural provisions of a contract governing the adjustment of rents were of "constitutional dimension." *National R.R. Passenger Corp.*, 470 U.S. at 472. This Court, however, has never found that parties contracting with the government have a substantive due process right to be free from modifications in procedures such as those at issue here. The process and methodology for making rent-adjustments, independent of financial end-results, is not protected by the Fifth Amendment. See *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 310 (1989).[34] Thus, even on the

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damaged by having to submit to a cumbersome, arbitrary, time-consuming, and expensive process not provided for in their contract." But HUD has always had the right, even under the *Rainier View* interpretation of the contracts, to conduct comparability studies; the court of appeals held only that HUD was required to fold "those studies into the factors used to calculate the formula rent adjustments." Pet. App. 4a-5a. Thus, the new statute's provision for comparability studies imposes no novel process-related burdens. In any event, a claim that Section 801(c) might be implemented in a burdensome way is clearly not ripe; new program regulations have not been finalized and HUD has not conducted any comparability studies under its new criteria.

[34] In *Duquesne Light*, the Court rejected the claim under the Takings Clause that a utility could challenge "subsidiary aspects of [the State's] ratemaking methodology * * * piecemeal" when the utility was not harmed by the "net effect" of regulation. 488 U.S. at 313-314. The Court explained:

> [A]ll of the subsidiary aspects of valuation for ratemaking purposes could not properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree. Today we reaffirm these teachings of [*FPC* v.] *Hope Natural Gas*[, 320 U.S. 591, 602 (1944)]: "[I]t is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."

*Id.* at 310; see also *id.* at 317 (Scalia, J., concurring) (endorsing constitutional rule for ratemaking that "looks to the consequences



view that Section 801 alters the Assistance Contracts, the "alteration of contractual obligations is minimal"; therefore, the due process "inquiry may end at this stage." *National R.R. Passenger Corp.*, 470 U.S. at 472.

### B. To The Extent That Respondents' Rights Are Substantially Impaired, Congress's Action Is Justified Under The Due Process Clause

When Congress enacts economic regulation that impairs private contracts, it is well established that review of such impairment "is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way." *National R.R. Passenger Corp.*, 470 U.S. at 472 (internal quotation marks omitted); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Retroactive legislation is governed by the same due process principle; it is valid if the law's retroactive application is "justified by a rational legislative purpose." *United States* v. *Sperry Corp.*, 493 U.S. 52, 64 (1989), quoting *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

When, as here, the contract alleged to be impaired is the federal government's own, the Court has suggested that the Due Process Clause may "warrant[] application of [a] more rigorous standard of review" because of the need to "maintain the credit of public debtors" and

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a governmental authority produces rather than the techniques it employs"). The issue of whether respondents have been deprived of their property without due process is analogous to the issue of whether it has been taken without compensation under the Takings Clause. See *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-224 (1986). As in the Takings context, the congressional modification of payment procedures does not have a "substantial" impact on property rights, when the net economic outcome is unchanged.

because the government's "self-interest is at stake." *National R.R. Passenger Corp.*, 470 U.S. at 471-472 & n.24; see also *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 n.25 (1977). As the Court has explained, "Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money." *POSSE*, 477 U.S. at 55, citing *Lynch* v. *United States*, 292 U.S. 571, 580 (1934); *Perry* v. *United States*, 294 U.S. 330, 350-351 (1935).[35]

Under those principles, Congress's enactment of Section 801 is constitutional. The statute is neither arbitrary nor irrational in light of Congress's purpose to respond to *Rainier View* by reinstating the market-rent approach of the Section 8 program. And, to the extent any inquiry into the legitimacy of Congress's purpose is warranted, the legislation in this case was not simply aimed at saving money; rather, it was a measured response to the disorder in the Section 8 program created by the decision in *Rainier*

[35] The Court has described a different standard for reviewing state legislation under the Contract Clause, Art. I, § 10, Cl. 1 ("No State shall * * * pass any * * * Law impairing the Obligation of Contracts."). In that context, the Court has indicated that, to withstand constitutional scrutiny, state legislation impairing state debt contracts must be "reasonable and necessary to serve an important public purpose." *United States Trust Co.* v. *New Jersey*, 431 U.S. at 25. The Contract Clause standard is not applicable here. "As we made clear in *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Co.*, 467 U.S., at 732-733, we have never held that the principles embodied in the Fifth Amendment's due process guarantee are coextensive with the prohibitions against state impairment of contracts under the Contract Clause, and, we observed, to the extent the standards differ, a less searching inquiry occurs in the review of federal economic legislation." *National R.R. Passenger Corp.*, 470 U.S. at 472 n.25. The Court has declined to transpose Contract Clause principles to the federal government in part because "records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. at 732 n.9.



*View* and was designed to reinforce, and to restore on a national level, the premises of that public welfare program. Thus, even assuming substantial impairment of contracts, Section 801 is constitutional.

### 1. *Curative legislation principles apply here*

a. As this Court reaffirmed just last Term, a legislature may permissibly respond to the "unexpected results" of a judicial decision by restoring the legal regime that had previously been understood to prevail. *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992). In *Romein*, the Court rejected a due process challenge to a state law that retroactively adjusted payments owed to injured workers in order to "preserve[] the delicate legislative compromise that had been struck" in a prior workers' compensation statute, after the state supreme court had rendered an unanticipated construction of the law. 112 S. Ct. at 1112. Other decisions have likewise upheld curative legislation against due process challenges. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 57-58 (1989); *Opdyke Investment Co.* v. *Detroit*, 883 F.2d 1265, 1274-1276 (6th Cir. 1989); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259-261 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

The Court has upheld curative legislation even when it extinguishes "vested rights" against the government. In *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931), the Court approved of a "curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."[36] The Court rejected the claim that the statute

[36] There, the IRS had failed to institute distraint proceedings to collect taxes within five years of the filing of a return, in reliance on its view that the five-year limitations period applied only to judicial collection actions. After this Court ruled in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U.S. 346 (1927), that the limitations period also applied to distraint proceedings, taxpayers

infringed vested rights, stating that "[w]here the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist." 282 U.S. at 429.

In this case, the court of appeals believed that Congress's power to enact curative legislation extends only to the correction of statutory holdings and the withdrawal of gratuitous benefits, not to the alteration of "vested rights." Pet. App. 10a-12a. This Court, however, has never so limited the scope of curative legislation; rather, it applied the doctrine in rejecting a "vested rights" claim in *Graham & Foster* v. *Goodcell*, *supra*. Curative legislation is constitutionally reasonable because it responds to an unexpected interpretation of rights, and provides a fair remedy that is consistent with the overall legislative purpose. There is no basis for excepting legislation affecting government contracts from that general principle.

b. Section 801 is rational curative legislation. In reliance on its understanding of the statute and contracts, HUD for years had adjusted rents through separate comparability caps rather than by altering its formulas in light of comparability studies. The unexpected decision in *Rainier View* upset that scheme of administration and resulted in the prospect of substantial windfalls for Section 8 project owners. In response to the court's unanticipated reading of the contracts, Congress moved to protect the original market-rent premise of the Section 8 program, see S. Rep. No. 693, 93d Cong., 2d Sess.

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brought suit to collect refunds to which they were statutorily entitled. In response, Congress enacted Section 611 of the Revenue Act of 1928, ch. 852, 45 Stat. 875, to prevent the payment of such refunds. *Graham & Foster*, 282 U.S. at 413-414, 416-418.



45-46 (1974), and reaffirmed the basic comparability test.

Those facts illustrate the reasons for viewing curative legislation as permissible under the Due Process Clause. Project owners long knew of HUD's position that separate comparability caps were permissible. They were well aware from the Housing and Community Development Act of 1987 that Congress shared that view. See note 5, *supra*. At the very least, the contract language made that position a reasonable one; it should therefore have come as no surprise to project owners that Congress would react to *Rainier View*.[37]

The *Rainier View* decision left some owners with a claim to *above*-market rent adjustments despite the fact that the Section 8 program was clearly designed to provide prevailing market rents. If HUD had incorporated comparability studies into the Adjustment Factors, as *Rainier View* later required, respondents would not have received rents materially above a comparable level; yet that is what they now claim. Congress acted reasonably in remedying the excessive adjustments produced by the agency's "defect in administration." *Graham & Foster* v. *Goodcell*, 282 U.S. at 429; cf. *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990). It also acted reasonably in providing a sound footing for future administration of the program.

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[37] Furthermore, the contractual holding of *Rainier View* was predicated on a mistaken interpretation of the underlying statute. 848 F.2d at 991 (interpreting the contract's "overall limitation" provision, "consistent with its statutory analog, * * * [as] clearly a limitation on the calculation of the formula[,] * * * not an independent basis for making annual rent adjustments"); see also note 4, *supra* (court of appeals noted that the claim in *Rainier View* "rests at bottom on statutory or regulatory rights"). When a court interprets a contract in reliance on its understanding of a statute, Congress may permissibly respond to that holding by correcting what it perceives to be a dual error.

As this Court has noted "[l]aws which restrict a party to those gains reasonably to be expected from the contract" are not unconstitutional, "notwithstanding that they technically alter an obligation of a contract." *El Paso* v. *Simmons*, 379 U.S. at 515.[38] In the context of the Section 8 program, Congress acted rationally in responding to *Rainier View* by reestablishing a mechanism to avoid excessive rent adjustments.

### 2. *The "vested rights" doctrine is inapplicable*

In striking down Section 801, the court of appeals concluded that Congress's purpose in enacting the legislation was "solely to save money" and that the law therefore infringed "vested rights" under *Lynch* v. *United States*, 292 U.S. 571 (1934), and *Perry* v. *United States*, 294 U.S. 330 (1935). Pet. App. 14a. The court of appeals' holding misconceives the purposes for which Congress acted, and expands *Lynch* and *Perry* far beyond their proper scope.

a. The situation that Congress confronted after *Rainier View* was one of greater disorder in the Section 8 program that was detrimental to the program's purpose. Although Section 8 is a national social-welfare program, designed to provide market-level rents subsidies under uniform criteria, project owners in the Ninth Circuit were able to claim what HUD and Congress perceived as excessive rental adjustments for the past. Moreover, such windfalls would continue unless HUD under-

[38] In *El Paso*, the Court upheld a Texas law shortening the time within which land purchasers from the State could reinstate their rights to land previously forfeited due to failure to pay interest. Even though that restriction resulted in a complete loss of contract rights upon the expiration of the shortened period, this Court held that it did not violate the Contract Clause, because the unanticipated development of speculation in land had made it important for Texas to shorten the redemption period, and the purchasers could not reasonably have expected that the right of redemption would be perpetual. 379 U.S. at 513-517.



took the complicated and burdensome task of developing a new adjustment system to comply with the *Rainier View* ruling.

Even if HUD performed that task, the national uniformity of the program would still be disrupted, because project owners in different jurisdictions, who were not entitled to claim the benefit of *Rainier View*, continued to challenge HUD's methodology and right to use separate comparability caps. It was uncertain what requirements, if any, those courts would impose on HUD. In the meantime, annual rent adjustments at thousands of projects were subject to inconsistent procedures based solely on a project's location. See National Leased Housing Ass'n Amici Br. 3-6 (dated Oct. 26, 1992).

To restore uniform procedures in the Section 8 program and to rectify the mistaken *Rainier View* holding, Congress enacted Section 801. Members of Congress expressed the view that the *Rainier View* decision was wrong. See note 7, *supra*. They rejected, however, the alternative of saddling the Section 8 program with years of litigation and inconsistency in the rent adjustment process. Instead, Congress proposed Section 801, finding that "[b]y * * * making the statutory standards for applying comparability more concrete" and "further requiring HUD to promulgate regulations for future year rent adjustments, this amendment should eliminate uncertainty and contribute to smooth and effective operation of the section 8 program." 135 Cong. Rec. S16,602 (daily ed. Nov. 21, 1989) (remarks of Sen. D'Amato).

In light of the significant threats to the proper operation of the Section 8 program, Congress was not powerless to enact reasonable measures, in line with the Act's original premises, to reestablish national standards. It is true that some legislators noted that Section 801 would save the government money that would otherwise be due if *Rainier View* were the final word. See, *e.g.*, 135 Cong. Rec. H9,686 (daily ed. Nov. 21, 1989) (remarks of Rep. Gonzalez); *id.* at S16,607 (remarks of Sen. Sasser). But

the overall legislation is not simply an economy measure. Congress granted financial rights to the owners that they would not have otherwise had [39] and tailored the statute to answer the owners' administrative complaints about comparability studies.[40] Such congressional action was necessary to break the logjam created by *Rainier View* and to restore a proper basis for adjusting rents. The Due Process Clause does not prevent Congress from enacting such reforms in regulating its welfare programs.

b. The notion that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights," and that such vested rights cannot be abrogated solely to save the government money, *POSSE*, 477 U.S. at 52, 55, stems from this Court's decisions in *Lynch* v. *United States*, *supra*, and *Perry* v. *United States*, *supra*. Those cases, however, do not apply here.[41]

In *Lynch*, the Court considered a law that repealed the government's obligation to pay benefits on "War Risk" life insurance policies issued during World War I for which premiums had already been paid. 292 U.S. at 579-580. The Court noted that because Congress had the power to authorize the issuance of the policies, "the due

[39] The Reform Act provides a higher retrospective payment to owners than the results of comparability studies would have allowed, regardless of the circuit in which the project is located. See note 27 and accompanying text, *supra*. Congress has appropriated $210 million to fund those payments. See note 10 and accompanying text, *supra*.

[40] The Reform Act limits HUD's resort to comparability studies, required the agency to look into the feasibility of using other methods, and compels it to promulgate regulations to ensure consistency and fairness in the determination of comparable rents. See note 30 and accompanying text, *supra*.

[41] In *POSSE*, the Court's description of *Lynch* and *Perry* was dictum. That case held that when Congress eliminated the States' contractual right to withdraw from the federal Social Security program, the contractual right lost did not "rise to the level of 'property' " under the Fifth Amendment. 477 U.S. at 55.



process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power." *Id.* at 579. The Court found, however, that Congress had not faced any "supervening conditions" that authorized it to abrogate the contracts. *Id.* at 579-580. Rather, the law in question, which was "popularly known as the Economy Act," represented an attempt to "lessen government expenditure." *Id.* at 580. The Court concluded that "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Ibid.*

*Lynch* is distinguishable from this case. First, unlike in *Lynch*, Congress did not entirely abrogate its contracts in enacting Section 801. The project owners retain the core economic features of their bargain, and the obligation of their contracts continues in force. As in the related Fifth Amendment Takings context, the complete abrogation of a party's economic rights through regulation raises different, and more serious, concerns than regulation that merely alters those rights. See *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2893-2894 (1992); cf. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

Second, the Court in *Lynch* saw no congressional justification for the interference with contract rights other than to lessen government expenditures; there were no "supervening conditions" implicating the police power. 292 U.S. at 579.[42] In this case, however, Congress was responding to the confusion engendered by *Rainier View*, and was seeking, as in *POSSE*, to reform "a comprehensive social welfare program affecting millions of individuals." 477 U.S. at 53. Those purposes provide legitimate justifications for Section 801 that were absent in *Lynch*.

In *Perry*, the government had issued bonds "payable in United States gold coin of the present standard of

[42] The examples the Court gave of such conditions represented ordinary uses of the commerce power. See *Lynch*, 292 U.S. at 579

value." 294 U.S. at 347. After issuance of the bonds, Congress passed a resolution stating that provisions requiring payment in "gold or a particular kind of coin or currency" were against public policy and were dischargeable only with legal tender. *Id.* at 349. When the government, pursuant to the resolution, refused to redeem the bonds except by paying their face value in legal tender currency, the bondholder sought damages based on the dollar value of the amount of gold contained in the gold coins he had been promised. *Id.* at 347, 355.

The Court held that the resolution invalidating a term on which the government had borrowed money was unconstitutional, because Congress's power to borrow money "on the credit of the United States," 294 U.S. at 350, entails the power to make a binding promise that a subsequent Congress cannot "alter" or "destroy." *Id.* at 353-354.[43] Nevertheless, the Court determined that the bondholder could not recover damages. *Id.* at 357-358. As Justice Stone's concurrence explained, the plaintiff was

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n.7, citing *Lottery Case*, 188 U.S. 321, 363-364 (1903) (Congress has the power to prohibit interstate transfer of lottery tickets); *Hipolite Egg Co.* v. *United States*, 220 U.S. 45, 58 (1911) (upholding Congress's power to seize and condemn adulterated food); *Hoke* v. *United States*, 227 U.S. 308, 323 (1913) (upholding statute prohibiting interstate "White Slave" traffic); *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156-157 (1919) (upholding wartime prohibition measure); *Calhoun* v. *Massie*, 253 U.S. 170, 175 (1920) (upholding law invalidating contracts for attorney's fees in veterans' cases). In *Massie*, the Court cited all of those cases for the proposition that "[a]n appropriate exercise by a state of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results." 253 U.S. at 175.

[43] The Court also relied on the provision of the Fourteenth Amendment that "[t]he validity of the public debt of the United States, authorized by law, * * * shall not be questioned." U.S. Const. Amend. XIV, § 4. 294 U.S. at 354. The Court did not rely on the Due Process Clause.



not damaged "because Congress, by the exercise of its power to regulate the currency, has made it impossible for the plaintiff to enjoy the benefits of gold payments promised by the Government." 294 U.S. at 360.

*Perry* does not assist the respondents in this case. The proposition embraced in *Perry* was that "when the Government borrows money, the credit of the United States is [not] an illusory pledge." 294 U.S. at 350. That proposition is not applicable here, because this case does not involve the government's repudiation of a debt incurred under the constitutional power to borrow money. Moreover, *Perry*'s actual holding is narrower than its language would suggest, for what the Court gave the bondholder in upholding his contract claim, it took away in rejecting his request for damages.[44] *Perry* should not be extended beyond its unusual facts to encompass the vastly different context surrounding Congress's enactment of Section 801.

Section 801 constitutes an intricate adjustment of the payment provisions in a comprehensively regulated low-income housing program. The statute eliminates the unforeseen obstacle that *Rainier View* had put in the way of Congress's original policy and restores uniformity to the program's operation. Because Congress had valid regulatory purposes quite apart from saving the government money, Section 801 does not violate the Due Process Clause.

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[44] *Perry* repeatedly characterized the government's obligations as having a "binding quality." 294 U.S. at 349, 351, 353-354. But in ruling that Congress's paramount power to regulate currency trumped the plaintiff's right to obtain the gold coin he was promised (or its equivalent in currency), the Court gave substantial deference to Congress's underlying policy of eliminating gold coin as a medium of exchange.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057-2059, provides:

### SEC. 801. ANNUAL ADJUSTMENT FACTORS FOR SECTION 8 RENTS

(a) **Effect of Prior Comparability Studies.—**

(1) **In General.**—In any case in which, in implementing section 8(c)(2) of the United States Housing Act of 1937—

(A) the use of comparability studies by the Secretary of Housing and Urban Development or the appropriate State agency as an independent limitation on the amount of rental adjustments resulting from the application of an annual adjustment factor under such section has resulted in the reduction of the maximum monthly rent for units covered by the contract or the failure to increase such contract rent to the full amount otherwise permitted under the annual adjustment factor, or

(B) an assistance contract requires a project owner to make a request before becoming eligible for a rent adjustment under the annual adjustment factor and the project owner certifies that such a request was not made because of anticipated negative adjustment to the project rents.

for fiscal year 1980, and annually thereafter until regulations implementing this section take effect, rental adjustments shall be calculated as an amount equal to the annual adjustment factor multiplied by

a figure equal to the contract rent minus the amount of contract rent attributable to debt service. Upon the request of the project owner, the Secretary shall pay to the project owner the amount, if any, by which the total rental adjustment calculated under the preceding sentence exceeds the total adjustments the Secretary or appropriate State agency actually approved, except that solely for purposes of calculating retroactive payments under this subsection, in no event shall any project owner be paid an amount less than 30 percent of a figure equal to the aggregate of the annual adjustment factor multiplied by the full contract rent for each year on or after fiscal year 1980, minus the sum of the rental payments the Secretary or appropriate State agency actually approved for those years. The method provided by this subsection shall be the exclusive method by which retroactive payments, whether or not requested, may be made for projects subject to this subsection for the period from fiscal year 1980 until the regulations issued under subsection (e) take effect. For purposes of this paragraph, "debt service" shall include interest, principal, and mortgage insurance premium if any.

(2) **Applicability.—**

(A) **In General.**—Subsection (a) shall apply with respect to any use of comparability studies referred to in such subsection occurring before the effective date of the regulations issued under subsection (e).

(B) **Final Litigation.**—Subsection (a) shall not apply to any project with respect to which litigation regarding the authority of the Secretary to use comparability studies to limit rental adjustments under section 8(c)(2) of the United States Housing Act of 1937 has resulted in a



judgment before the effective date of this Act that is final and not appealable (including any settlement agreement).

(b) **3-Year Payments.**—The Secretary shall provide the amounts under subsection (a) over the 3-year period beginning on the effective date of the regulations issued under subsection (e). The Secretary shall provide the payments authorized under subsection (a) only to the extent approved in subsequent appropriations Acts. There are authorized to be appropriated such sums as may be necessary for this purpose.

(c) **Comparability Studies.**—Section 8(c)(2)(C) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)(2)(C)) is amended by inserting after the period at the end of the first sentence the following: "In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under subparagraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secre-

tary determines that such modified annual adjustment factor cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units."

(d) **Determination of Contract Rent.**—(1) The Secretary shall upon the request of the project owner, make a one-time determination of the contract rent for each project owner referred to in subsection (a). The contract rent shall be the greater of the contract rent—

(A) currently approved by the Secretary under section 8(c)(2) of the United States Housing Act of 1937, or

(B) calculated in accordance with the first sentence of subsection (a)(1).

(2) All adjustments in contract rents under section 8(c)(2) of the United States Housing Act of 1937, including adjustments involving projects referred to in subsection (a), that occur beginning with the first anniversary date of the contract after the regulations issued under subsection (e) take effect shall be made in accordance with the annual adjustment and comparability provisions of sections 8(c)(2)(A) and 8(c)(2)(C) of such Act, respectively, using the one-time contract rent determination under paragraph (1).

(e) **Regulations.**—The Secretary shall issue regulations to carry out this section and the amendments made by this section, including the amendments made by subsection (c) with regard to annual adjustment



factors and comparability studies. The Secretary shall issue such regulations not later than the expiration of the 180-day period beginning on the date of the enactment of this Act.

(f) **Report.**—Not later than March 1, 1990, the Secretary shall report to the Congress on the feasibility and desirability, and the budgetary, legal, and administrative aspects, of adjusting contract rents under section 8(c)(2)(C) of the United States Housing Act of 1937 on the basis of any alternative methodologies that are simpler in application than individual project comparability studies.

(g) **Technical Amendment.**—The first sentence of section 8(c)(2)(C) of the United States Housing Act of 1937 is amended by inserting ",type," after "quality".

Section 8(c)(2) of the United States Housing Act of 1937, 42 U.S.C. 1437f(c)(2) (1982), as added by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, Tit. II, § 201(a), 88 Stat. 663, provides in relevant part:

(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs

which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A).

(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

24 C.F.R. 880.609 and 888.204 provide:

**§ 880.609 Adjustment of contract rents.**

(a) *Automatic annual adjustment of Contract Rents.* Upon request from the owner to the contract administrator, contract rents will be adjusted on the anniversary date of the contract in accordance with 24 CFR part 888.

(b) *Special additional adjustments.* For all projects, special additional adjustments will be granted, to the extent determined necessary by HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the assisted units which have resulted from substantial general increases in real property taxes, assessments, utility rates, and utilities not covered by regulated rates, and which are not adequately compensated for by annual adjustments under paragraph (a) of this section. The owner must submit to the contract administrator required supporting data, financial statements and certifications.

(c) *Overall limitation.* Any adjustments of contract rents for a unit after Contract execution of cost certification, where applicable, must not result in material differences between the rents charged for assisted units and comparable unassisted units except to the extent that the differences existed with respect



to the contract rents set at Contract execution or cost certification, where applicable.

**§ 888.204 Revision to the automatic annual adjustment factors.**

If the application of the Annual Adjustment Factors results in rents that are substantially lower than rents charged for comparable units not receiving assistance under the U.S. Housing Act of 1937 in the area for which the factor was published or a portion thereof, and it is shown to HUD that the costs of operating comparable rental housing have increased at a substantially greater rate than the Adjustment Factors, the HUD Field Office will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area. Any request for revision of the factors must be accompanied by an identification of the area, its boundaries and evidence that the area constitutes the largest contiguous area in which substantially the same rent levels prevail. The HUD Field Office will publish appropriate notice of the establishment of any such revised Automatic Annual Adjustment Factors. These factors will remain in effect until superseded by the subsequent publication of Automatic Annual Adjustment Factors pursuant to § 888.202.

Representative rent adjustment provision: Original Version of Assistance Contract.

**1.9 RENT ADJUSTMENTS**

a. *Funding of Adjustments.* Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this Section, up to the maximum amount authorized under Section 1.6a of this Contract.

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

c. *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (*i.e.*, assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments. The Owner shall submit to the Government financial statements which clearly support the increase.

d. *Overall Limitation.* Notwithstanding any other



provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

Representative rent adjustment provision: post-1980 Assistance Contract

**2.7 RENT ADJUSTMENTS.**

(a) *Funding of Adjustments.* Housing assistance payments will be made in amounts commensurate with Contract Rent adjustments under this section up to the maximum amount authorized under section 2.3(a) of this Contract.

(b) *Annual Adjustments.*

(1) Upon request from the Owner to the CA, Contract Rents will be adjusted on the anniversary date of the Contract in accordance with 24 CFR 888 and this Contract. See, however, paragraph (d).

(2) In the case of previously HUD-owned projects, the Contract Rents shall be adjusted in accordance with 24 CFR 886, Subpart C and this Contract.

(3) Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the annual adjustment result in Contract Rents less than the Contract Rents on the effective date of the Contract.

(c) *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, assessments, and utilities not covered by regulated rates. The Owner must demonstrate that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by annual adjustments. The Owner shall submit to HUD supporting data, financial statements and certifications which clearly support the increase. See, however, paragraph (d).

(d) *Overall Limitation.* Notwithstanding any other provision of this Contract, adjustments after Contract execution or cost certification, where applicable, shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by HUD; except to the extent that the differences existed with respect to the Contract Rents set at Contract execution or cost certification, where applicable.

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